THE MASSACHUSETTS CONSTITUTION, JUDICIAL REVIEW, AND SLAVERY

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A. Introduction

In 1780, when the Massachusetts Constitution went into effect, slavery was legal in the Commonwealth.[1] However, during the years 1781 to 1783, in three related cases known today as "the Quock Walker case," the Supreme Judicial Court applied the principle of judicial review to abolish slavery.[2] In doing so, the Court held that laws and customs that sanctioned slavery were incompatible with the new state constitution. In the words of then-Supreme Judicial Court Chief Justice William Cushing: "[S]lavery is in my judgment as effectively abolished as it can be by the granting of rights and privileges [in the constitution] wholly incompatible and repugnant to its existence."[3] This section introduces the legal status of slavery in Massachusetts prior to 1780, the Mum Bett case of 1781, and the Quock Walker case.

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[1] Literature regarding the development and abolition of slavery in Massachusetts and other northern states is vast and complex. This section is intended to provide basic information to students and educators, so that a context is provided for the legal cases. Websites that provide a brief overview include www.slavenorth.com and www.slaveryinamerica.org. Noted books on this subject include Joanne Pope Melish, Disowning Slavery: Gradual Emancipation and Race in New England, 1780 - 1860 (2000) and Arthur Zilversmit, First Emancipation: The Abolition of Slavery in the North (1967).

[2] Thus, the Supreme Judicial Court relied on a brand new state constitution and the emerging principle of judicial review twenty years before the United States Supreme Court articulated this principle in *Marbury v. Madison*, 5 U.S. 137 (1803).

[3] The full text of Chief Justice Cushing's remarks is printed in John Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the "Quock Walker Case*," 5 The American Journal of Legal History 118 (1961).

B. Slavery in Colonial and Revolutionary Massachusetts

It is generally agreed that African slaves first arrived in Massachusetts in the 1630's, and slavery was legally sanctioned in 1641. During the colonial era, numerous laws were passed regulating movement and marriage among slaves, and Massachusetts residents actively participated in the slave trade. Historians estimate that between 1755 and 1764, the Massachusetts slave population was approximately 2.2 percent of the total population; the slave population was generally concentrated in the industrial and coastal towns.[4]

As the rhetoric supporting independence of the colonists from Great Britain intensified in the colony of Massachusetts, some noted the glaring inconsistency of arguing for the rights of Englishmen while owning slaves. For example, James Otis, a leading proponent of colonial independence, wrote in a highly regarded and influential 1764 pamphlet that "The colonists are by the law of nature freeborn, as indeed all men are, white or black."[5]

Historian Joanne Pope Melish observed that "the onset of the Revolution both intensified the attack and weakened the structures and practices that supported the institution [of slavery in New England]. . . . New England was not ultimately dependent on slave labor, and the war disrupted patterns of production and trade in the very areas in which slave labor was most heavily engaged; the coastal trade, the provisioning trade with the West Indies, fishing, and shipping in general."[6]

Slaves too were active in seeking the end of slavery in Massachusetts. For example, in 1773, a group of slaves petitioned the General Court (legislature) to end slavery, and directly tied their search for liberty to the colonists' struggles with Great Britain.[7]

As discussed in the section of this website entitled John Adams and the Massachusetts Constitution, the Constitution of 1780 was preceded by a constitution drafted by the legislature and rejected by the voters in 1778. The constitution proposed in 1778 would have recognized slavery as a legal institution, and excluded free African Americans from voting. The Constitution of 1780, in contrast, contained a declaration

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[4] See sources cited in note 1, supra.

[5] James Otis, The Rights of the British Colonies Asserted and Proved (1764), available at www.teachingamericanhistory.org.

[6] Melish, *supra* note 1 at 56 - 57.

[7] See, e.g., Zilversmit, *supra* note 1 at 100 - 103.

that “all men are born free and equal, and have . . . the right of enjoying and defending their lives and liberties.”

C. Freedom Suits of the Pre-Constitutional Era

Because Massachusetts slaves were considered both as property and as persons before the law, slaves could institute and prosecute lawsuits in the courts against their master (the defendant) who would be obliged to demonstrate their lawful title to ownership of their slave.[8] By 1780, nearly thirty slaves had sued their master for their freedom, most during the years following 1764.[9] However, these cases were not decided on the basis of any “natural right” to freedom; instead, the courts required a specific point of law to decide in favor of a slave, such as a master’s broken promise to grant freedom, or the questionable slave status of the individual’s mother.[10]

D. The Mum Bett case[11]

The 1781 Berkshire county case of *Brom and Bett v. Ashley*, often referred to as the Mum Bett or Elizabeth Freeman case[12], was unique because it occurred less than one year after the adoption of the Massachusetts Constitution and because, in contrast to prior freedom suits, there was no claim that John Ashley, the slave owner, had violated a specific law. This case was a direct challenge to the very existence of slavery in Massachusetts.

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[8] See Elaine MacEachern, *Emancipation of Slavery in Massachusetts: A Reexamination 1770 - 1790*, 55 The Journal of Negro History 289 (1970); Zilversmit, supra note 1, at 103 - 105.

[9] See Emily Blanck, *Seventeen Eighty-Three: The Turning Point in the Law of Slavery and Freedom in Massachusetts*, 65 The New England Quarterly 24, 27-28 (2002)(listing all documented freedom suits).

[10] See Zilmersmit, *supra* note 1 at 616-617.

[11] Original court records are in the custody of the Supreme Judicial Court, Division of Archives and Records Preservation. There are many secondary sources about the Mum Bett case; electronic sources include: http://www.masshist.org/longroad/01slavery/bett.htm; http://www.pbs.org/wnet/slavery/experience/legal/spotlight.html; http://www.juntosociety.com/founders/mumbett.html.

[12] Mum Bett identified herself as Elizabeth Freeman in her will. However, she remained known as Mum Bett throughout her life.

During the 1770's, Mum Bett was a slave in the household of Colonel John Ashley of Sheffield, a prominent citizen who at that time also served as a judge of the Berkshire Court of Common Pleas.

In early January, 1773, Ashley became moderator of a committee of eleven local citizens, including attorney Theodore Sedgwick, that wrote a document known as the Sheffield Declaration.[13] This document, approved by the Committee on January 12, 1773, expressed anger at how Great Britain was treating her subjects in the colony of Massachusetts, and resolved "[t]hat mankind in a state of nature are equal, free, and independent of each other, and have a right to the undisturbed enjoyment of their lives, their liberty and property." The Sheffield Declaration requested its local representative to the General Court in Boston to consider the Declaration and to use "every constitutional means in his power that the grievances complained of may be redressed. . . ."

According to later stories often told about Mum Bett, her freedom suit was prompted by her overhearing dinner table conversations in the Ashley home about the new promises of liberty made in the Sheffield Declaration (1773), the Declaration of Independence (1776), and the Massachusetts Constitution (1780). Other reports suggest that her suit was prompted when Bett's mistress, Mrs. Hannah Ashley, attempted to strike Bett's sister with a hot shovel, but struck and burned Bett when she intervened. Bett fled. When Ashley sought to reclaim his "property," Bett reportedly sought help from prominent local attorney Theodore Sedgwick, who had often visited the Ashley home and was clerk of the committee that had drafted the Sheffield Declaration. As historian Zilmersmit notes "[i]t is also possible that a group of prominent residents of Berkshire County selected Elizabeth and a Negro man, Brom, who was associated with her in the suit, in order to determine whether or not slavery was constitutional in Massachusetts after the adoption of the new constitution."[14]

Procedurally, the case began in May 1781 when the attorneys for Bett and Brom obtained a writ of replevin, an action for the recovery of property, from the Berkshire Court of Common Pleas. The writ ordered Ashley to release Bett and Brom to the Sheriff because they were not Ashley's legitimate property. Ashley refused.

When the case was tried in August 1781 before the County Court of Common Pleas in Great Barrington, Sedgwick argued that the Massachusetts Constitution had

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[13] The Sheffield Declaration has been posted online by The Trustees of Reservations, the organization that owns the John Ashley House. http://www.thetrustees.org/ashleyhouse.cfm

[14] Zilmersmit, *supra* note 1 at 619.

outlawed slavery. The jury determined that Brom and Bett were not Ashley's property. The court set Bett and Brom free and awarded them 30 shillings damages.

Ashley appealed to the Supreme Judicial Court but abandoned his appeal several months later. The timing of his decision suggests that Ashley may have determined that an appeal was futile following the first ruling of the Supreme Judicial Court in the Quock Walker case (see below).

Though little is known of Brom's later years, the remainder of Mum Bett's life is well known. Mum Bett worked for many years as a beloved domestic servant in the household of Theodore Sedgwick.[15] Upon her death in 1829, Mum Bett was buried in the Sedgwick family plot in Stockbridge. Her gravestone includes the words: "She was born a slave and remained a slave for nearly thirty years. She could neither read nor write, yet in her own sphere she had no superior or equal." Her tombstone stands in the innermost circle of what is known as the "Sedgwick Pie."

Theodore Sedgwick had an illustrious legal career, and served an Associate Justice of the Supreme Judicial Court from 1802 - 1813. His portrait hangs over the desk of The Honorable Margaret Marshall, who has served as Chief Justice of the Supreme Judicial Court since 1999.

E. The Quock Walker Case[16]

This case – actually a series of three cases -- began as a freedom suit based on a promise of freedom or manumission, but resulted in a sweeping declaration by

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[15] Sedgwick's daughter, Catharine, wrote a biographical essay about Mum Bett This entire essay is available at http://www.salemstate.edu/imc/sedgwick/slavery.html.

[16] Original court records are in the custody of the Supreme Judicial Court, Division of Archives and Records Preservation. Electronic information about the Quock Walker cases is available at The Long Road to Justice, www.masshist.org/longroad/01slavery/walker.htm. See also The Honorable Peter Agnes, *The Quork* [sic] *Walker Cases and the Abolition of Slavery in Massachusetts: A Reflection of Popular Sentiment or an Expression of Constitutional Law?*, 1992 Boston Bar Journal 8 (1992); Zilversmit, *Quok Walker, Mumbet, and the Abolition of Slavery in Massachusetts*, 25 The William and Mary Quarterly 614 (1968); Spector, *The Quock Walker Cases (1781- 83): Slavery, its Abolition, and Negro Citizenship in Early Massachusetts*, 53 The Journal of Negro History 12 (1968); O'Brien, *Did the Jennison Case Outlaw Slavery in Massachusetts?*, 17 The William and Mary Quarterly 219 (1960); Cushing, supra note 3.

Supreme Judicial Court Chief Justice William Cushing that the institution of slavery was incompatible with the principles of liberty and legal equality articulated in the new Massachusetts Constitution.

Quock Walker, a slave, was purchased as an infant by James Caldwell in 1754. In 1763, Caldwell died and his widow married Nathaniel Jennison. Walker became the property of Jennison, who resided in the central Massachusetts town of Barre. In 1781, at the age of 28, Walker fled to the home of Caldwell's sons. Jennison recaptured, beat, and reenslaved Quock Walker. Three court proceedings followed.[17]

In the first case, Walker, with the assistance of leading Worcester County attorneys Levi Lincoln and Caleb Strong, sued Jennison for assault and battery; Walker claimed he had been injured without right, as James Caldwell, his first master, had promised Walker freedom by age 25. This case was tried before a jury in the Worcester County Court of Common Pleas. The jury found "that the said Quork is a Freeman and not the proper Negro slave of [Jennison]," and awarded Walker damages of 50 pounds.

In the second case, tried during the same court session, Jennison sued Caldwell's brothers for interfering with his property; Jennison claimed the brothers had unlawfully enticed Walker away for their own benefit. In this action, Jennison prevailed, and the jury awarded him damages of 25 pounds.

Each side appealed these contradictory verdicts, and the two cases were placed on the docket of the Supreme Judicial Court in 1781. Jennison was ruled in default on his appeal for failing to present the required papers.

The Caldwell brothers prevailed in their appeal to the State's high court. Reports of this trial[18] reflect that attorney Levi Lincoln, who represented the Caldwell brothers, centered his argument on the promises of freedom contained in the new Massachusetts Constitution.

The following year, in June 1782, Jennison petitioned the General Court (the official name of the Massachusetts legislature) for reinstatement of the case he had lost by default ten months earlier. The legislature took no action.

Meanwhile, in what became the third Quock Walker case, the Attorney General

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[17] As noted, many historians and legal scholars have studied the Quock Walker cases. The summary of court proceedings presented here relies primarily on court papers and John Cushing's article on the Quock Walker cases. See note 3 *supra*.

[18] As discussed in the section of this website entitled The Massachusetts Judicial System, the Supreme Judicial Court was both a trial court and an appellate court during its early history.

prosecuted Jennison for criminal assault and battery upon Quock Walker. Jennison was indicted in September 1781, though the case did not come before the Supreme Judicial Court until April 1783.

In his charge to the jury,[19] Supreme Judicial Court Chief Justice William Cushing announced that slavery was incompatible with the new Massachusetts Constitution:

> . . . [T]hese sentiments [that are favorable to the natural rights of mankind] led the framers of our constitution of government – by which the people of this commonwealth have solemnly bound themselves to each other – to declare – that all men are born free and equal; and that every subject is entitled to liberty, and to have it guarded by the laws as well as his life and property. In short, without resorting to implication in constructing the constitution, slavery is in my judgment as effectively abolished as it can be by the granting of rights and privileges wholly incompatible and repugnant to its existence. The court are therefore fully of the opinion that perpetual servitude can no longer be tolerated in our government, and that liberty can only be forfeited by some criminal conduct or relinquished by personal consent or contract. And it is therefore unnecessary to consider whether the promises of freedom to Quaco, on the part of his master and mistress, amounted to a manumission or not.

The jury convicted Jennison, and the court ordered him to pay a fine of 40 shillings.

The 1790 census recorded no slaves in Massachusetts, but historians disagree over the role of the Quock Walker case in abolishing slavery in Massachusetts. The case was not widely reported, and changing economic conditions and public opinion increasingly hostile to slavery doubtless played an important role in slavery's demise. However, after the Quock Walker case, it was clear that a local (i.e. in-state) slaveowner would not prevail in the state courts. This, in turn, "undermined whites' confidence in their property rights in slaves, and . . . emboldened enslaved persons of color to demand manumission or wage compensation from their owners – [or] simply to walk away from them."[20] As historian John Cushing concluded, there is "ample evidence" that the Quock Walker cases were a significant step toward the end of slavery in Massachusetts.

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[19] Proceedings of the Supreme Judicial Court were not transcribed at this time. However, Chief Justice Cushing recorded his charge in his notebooks, and the entire charge is reprinted in Cushing, *supra* note 3, at 132-133. Early practice permitted each of the five justices individually to instruct the jury; however, no other charges have survived. Id.

[20] Melish, *supra* note 1 at 65.

F. Conclusion

Six years before ratification of the United States Constitution in 1789, and 20 years before *Marbury* v. *Madison* firmly established the principle of judicial review on a national level in 1803, the Massachusetts Supreme Judicial Court recognized the supremacy of the Massachusetts Constitution. Conceived and ratified by a unique and democratic process, the Constitution "justified and indeed compelled" judges to act so as to enforce its provisions over laws and customs that otherwise conflicted with it.[21]

President George Washington appointed Massachusetts Supreme Judicial Court Chief Justice William Cushing to be one of the first justices on the United States Supreme Court in 1790. Justice Cushing remained on that Court until 1810, and participated in deciding the case of *Marbury v. Madison*.

G. Resources

There is an extensive literature on the existence and abolition of slavery in Massachusetts. Some electronic resources are described in the Windowpane entitled Electronic Resource Guide.

[21] Agnes, *supra* note 16 at 11. See also William Nelson, Marbury v. Madison: The Origins and Legacy of Judicial Review 34-40 (2000)(arguing that several state courts, including Massachusetts, implicitly or explicitly applied the principle of judicial review during 1780-1800).